**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

FIRST APPEAL No. 1227 and 1228 of 1985

With
FIRST APPEAL NO.1157 of 1987

DATE OF DECISION : 12.01.2006.

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NEW INDIA ASSURANCE CO. LTD - Appellant(s)
Versus
JAYABEN SURESHBHAI PATEL AND OTHERS

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(For full Title See Next Page )

Coram :

The Hon'ble Mr.Justice Bhawani Singh,Chief Justice

The Hon'ble Justice Smt. Abhilasha Kumari

Whether approved for Reporting ?

Appearance :
Mr.Sunil B.Parikh for Mr.R.H.Mehta for appellant.
Mr.D.R.Bhatt, Mr.K.V.Shelat for claimants

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**PER : THE HON'BLE JUSTICE SMT.ABHILASHA KUMARI**

1. These two First Appeals, FA.No.1227 of 1985 and FA.No.1228 of 1985 filed by New India Assurance Co. have arisen out of M.A.C. Petitions

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Whether Reporters of Local Papers may be allowed to see the judgment ?

Nos.238 of 1982 and 239 of 1982 which have been disposed of by a common judgment and award dated 31.1.1985 by Motor Accident Claims Tribunal, Valsad at Navsari.

2. First Appeal No.1157 of 1987 has been filed by New India Assurance Co.Ltd. The same has arisen from M.A.C.Petition No.406 of 1981 decided by the Motor Accident Claims Tribunal (Aux.), Narol. In this Appeal, the judgment and award dated 22.4.1987 has been challenged. Since in all these three appeals a common question of law is in issue, the same have been heard and are being disposed of by a common judgment.

3. In first Appeal No.1227 of 1985 and First Appeal No.1228 of 1985, the incident occurred on 4.4.1982 at about 8.30 P.M. on National Highway No.8. The deceased Sureshbhai was riding his motor cycle with deceased Vasantbhai as a pillion

rider. They were both coming towards Navsari from Bombay side and as they came near Astogam village, oil tanker bearing No.MTB 7195 was found lying on the road as a result of an accident that had taken place about a week prior to the incident in question. The Tanker had caught fire because of its inflammable contents and the motor cycle ran into it causing serious injuries to the driver and the pillion rider, both of whom eventually succumbed to the injuries. In First Appeal No.1227 of 1985 arising out of M.A.C.Petition No.238 of 1982, a claim for Rs.4 lacs was filed by widow and minor children of deceased Sureshbhai alongwith his mother. In all there are four claimants. In First Appeal No.1228 of 1985, arising out of M.A.C.Petition No.239 of 1982 also, a claim for Rs.4 lacs has been filed by the widow and two minor children of the deceased Vasantbhai. It is stated in the claim petition that both the deceased were working as Goldsmith and were having their own customers and

were also taking job works from bigger merchants. Both the deceased were young and able and very well established in their business. As such they had a very bright future. Keeping in view the income at the time of the accident and near certain increase to it in the future, the dependents have filed the claim for the aforesaid amounts in their respective petitions. M.A.C.Petition No.238 of 1982 was treated as the main petition and evidence was recorded therein.

4. Written statement was filed only by the appellant - Insurance Company, which is at Exh.18. The stand taken is that of general denial, though the accident itself has not been specifically denied. It is stated in the written statement that the Tanker was lying well on the side of the road and was not an obstruction as claimed by the claimants. Alternate plea raised is that motor cyclist was also partially responsible for the accident. The main contention

taken by the appellant –Insurance Company was that the claim is exaggerated and in any case, the liability of the Company can not exceed Rs.50,000/–.

5. Issues were framed to decide the controversy between the parties, and evidence was adduced by examining claimant Nos.1 and 4 to the petition. There is no oral testimony regarding the accident. After taking into consideration the material on record, the Motor Accident Claims Tribunal came to the conclusion that the tanker was an obstacle to the traffic coming from Bombay side. It was required to be removed within 24 hours as per Rules, but was allowed to remain on the road for 7 days by respondent Nos.5 and 6 in a negligent manner. The deceased driver and pillion rider of the motor cycle, were held not responsible for the accident.Since the tanker was insured with the appellant, the appellant was held to be jointly and severally liable for the

entire amount of awarded compensation.

6. After deciding the dependency, the annual income of the deceased was worked out to Rs.24,000/-. A compensation of Rs.3,60,000/- was awarded to which Rs.14,000/- was added as global compensation and Rs.1000/- towards funeral expenses. A total amount of Rs.3,75,000/- was awarded in M.A.C.Petition No.238 of 1982 out of which First Appeal No.1227 of 1985 has arisen. Similarly in Claim Petition No.239 of 1982, after deciding monthly dependency, the annual income was worked out to Rs.24,000/- and the compensation of Rs.3,60,000/- was awarded. To this amount Rs.1000/- was added as the funeral expenses and Rs.14,000/-as global compensation and in this M.A.C.Petition as well, the total compensation awarded is Rs.3,75,000/-, which has been challenged in First Appeal No.1228 of 1985.

7. In First Appeal No.1157 of 1987, the deceased was driver of a taxi car, who was plying the

taxi bearing Registration No.GTH 9707 and carrying the parcels of daily "Sandesh" from Ahmedabad to Bhavnagar. When on 9.2.1981 at about 5.00 A.M. near village Polarpur on the Highway between Ahmedabad and Bhavnagar the truck bearing No.P.B.N.7597 came at a high speed on the wrong side in a negligent manner and dashed against the taxi resulting in serious injuries to the taxi driver,which resulted in his death. The Motor Accident Claims Tribunal vide its judgment and award dated 22.4.1987 came to the conclusion that the monthly gross income of the deceased would be Rs.7050/- and after deducting the cost of fuel, the same would remain at Rs.3050/-, rounded up to Rs.3000/. The annual income was calculated at Rs.36,000/- and since the age of the deceased was 30 years, the multiplier of 15 was applied and the compensation awarded was Rs.5,40,000/-. To this amount, Rs.10,000/- was added for the loss of expectation of life and Rs.40,000/- towards damage to the

taxi car. In all they were entitled to Rs.5,90,000/- but since the claim was limited to Rs.3,00,000/-, the compensation awarded is Rs.3,00,000/-.

8. Both the Motor Accident Claims Tribunals had extended the liability for the entire amount of awarded compensation jointly and severally on all the opponents therein, including the present appellants. The main question which arises for determination in these appeals is whether the Insurance Company is liable for the full amount of awarded compensation or whether the liability of the Insurance Company is limited to Rs.50,000/- as per the terms and conditions of the Insurance Policy.

9. We have heard learned counsel for the parties and gone through the material on record. It had been argued by the learned counsel for the appellant that although the policy of Insurance

is a comprehensive policy that does not mean that the liability of the Insurer is unlimited. The liability of the insurer depends on the terms and conditions of the contract between the insured and the insurer and the Motor Accident Claims Tribunal has erred in allowing the claim of the claimants and making the Insurance Co. liable for the full amount awarded to the respective claimants alongwith other opponents in the claim petitions.

10. To appreciate this contention of the learned counsel for the appellants, it would be appropriate to refer to the relevant recitals in the policy which have a bearing on the question involved for determination in these cases. The Policy which is exhibited as Exh.32 in M.A.C. Petition No.238 of 1982 is being referred to and there is no dispute that the policy in the other two appeals also has similar terms and conditions. On the front page of Exh.32, towards the bottom, there is a column titled "Limits of

Liability" which is reproduced as under:

> "Limit of the amount of the company's liability under Section II-I (i) in respect of any accident.
> Rs.,50,000/-
>
> Limit of the amount of the Company's liability under Section II-I(ii) in respect of any claim or series of claims arising out of one event.
> Rs.50,000/-"

11. In the same policy, Section II deals with the liability of third parties, which reads as under:

> "1. Subject to the Limits of Liability the Company will indemnify the insured against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of -
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> (i)death of or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the Motor Vehicle.
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> (ii) Damage to property caused by the use(including the loading and/or unloading) of the Motor Vehicle."

12. The third relevant recital in the policy is the one titled "Avoidance of certain terms and right of recovery", which is also reproduced as

under:

> "Nothing in this Policy or any endorsement hereon shall affect the right of any person indemnified by this Policy or any other person to recover an amount under or by virtue of the Provisions of the Motor Vehicle Act, 1939, Section 96.
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> BUT the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions."

13. Other two policies also have similar terms and conditions.

14. Admittedly the Insurance Policy is of a date prior to the coming into force of the new Motor Vehicles Act, 1988 on July 1, 1989. The liability of the Insurance Company to satisfy the judgments against the persons insured in respect of the third party risk was covered under Sec.96 of the Motor Vehicle Act, 1939, the relevant part of which reads as under:

> "Sec.96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks:- (1) If, after a certificate of insurance has been issued under sub-sec.(4) of Sec.95 in favour of the person by whom a policy has been effected,

> judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-sec.(1) of Sec.95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this Section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment - debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

15. The main contention of the appellant-Insurance Company is that looking to the specific terms and conditions stipulated in the insurance Policy, the appellant-Insurance Company is not liable to pay any amount over and above Rs.50,000/-. In support of this contention Mr.Sunil Parikh appearing for the appellant in all these matters has placed reliance upon **1988 ACJ 270 (National Insurance Co.Ltd. v. Jugal Kishore and others)**, ratio of which is that in comprehensive policy of insurance the limit of

liability with regard to third party risk does not become unlimited or higher than the statutory limit. To further strengthen this contention, reliance has been placed on Constitution Bench judgment in **2002 ACJ 271 (New India Assurance Co.Ltd. v. C.M.Jaya and others).** In this case the accident resulted in the death of the pillion rider on two wheeler when the scooter met with an accident with a truck. Though the truck was comprehensively insured, no additional or higher premium was paid to cover unlimited or higher liability than the statutory liability of a third party. It was held that the liability of the Insurance Company was limited to Rs.50,000/- as per statute at the time of accident and that in absence of payment of higher premium, it can not be said that under the present policy the liability of the Insurance Company is unlimited qua the third party.

16. Per contra, it has been argued that although

the Insurance policy stipulates that the liability of the Insurance Company qua the third party will be limited to Rs.50,000/-, yet the policy has to be read as a whole and the Avoidance Clause, which has already been reproduced hereinabove, protects the rights of the person indemnified by the policy or any other person to recover the amount from the Insurance Co. However,the Insurance Company can recover the amount in excess of the statutory liability from the insured and the Avoidance Clause precludes the Insurance Company from resisting or restricting the claim made by the claimants in excess of the stipulated statutory liability. In support of this contention, reliance has been placed on **AIR 1964 SC 1736 ( New Asiatic Insurance Co.Ltd. v. Pessumal Dhanamal Aswani and others).** In this judgment, the Supreme Court dealt with the Avoidance Clause in the policy at length and has came to the conclusion that once the Company has undertaken liability to a

third party incurred by the persons specified in the policy, the third party's right to recover any amount under, or by virtue of the provisions of the Act, is not affected by any stipulation or condition in the policy. In this judgment, the question whether the Insurance Co. is entitled to recover the amount in excess of the statutory liability from the insured has been left open. Another judgment relied upon by the learned counsel for the respondents is **(2001) 2 SCC 491 (Oriental Insurance Co.Ltd. v. Cheruvakkara Nafeessu and others)**. The ratio of this judgment is to the effect that the liability of the Insurance Co. in cases of third party risk is limited to Rs.50,000/- as per Section 95(1)(b) of the Motor Vehicles Act, 1939. However, the direction of the Claims Tribunal and the High Court to the appellant Company to pay the whole of the awarded amount to the claimant on the basis of contractual obligation contained in the clauses relating to liability of third parities

and avoidance clause is not unjustified. The appellant Insurance Company is entitled to recover the excess amount from the insured by executing this award against the insured to the extent of such excess as per Section 174 of the Motor Vehicles Act, 1988. In this case, **1988 ACJ 270 (National Insurance Co.Ltd. v. Jugal Kishore and others) (Supra) and AIR 1964 SC 1736 ( New Asiatic Insurance Co.ltd. v. Pessumal Dhanamal Aswani and others)(Supra)** have also been noted and discussed.

17. In **2003 (2) GLR 1684 (Oriental Fire and General Insurance Co. v. Firdos Pervez Mysorewala and others)**, following the judgment of the Hon'ble Supreme Court in **(2001) 2 SCC 491 (Oriental Insurance Co.Ltd. v. Cheruvakkara Nafeessu and others)** (supra) this Court has also come to the conclusion that although the statutory liability of the Insurance Company in cases of third party risk is limited to

Rs.50,000/-, the Insurance Company is liable to pay the whole of the awarded amount to the claimants on the basis of the contractual obligation contained in clauses relating to the liability of the third parties and avoidance clause. However, the Insurance Company is entitled to recover the excess of the amount paid from the insured in appropriate execution proceedings.

18. In **2002 ACJ 271 (New India Assurance Co.Ltd. v. C.M.Jaya and others) (Supra)**, which is a Constitution Bench judgment of the Supreme Court, the judgment cited at **AIR 1964 SC 1736 (New Asiatic Insurance Co.ltd. v. Pessumal Dhanamal Aswani) (Supra)**, wherein the Avoidance Clause has been dealt with and where the court has come to the conclusion that the contractual obligations of the parties must be fulfilled and the Insurance Company is liable to pay entire awarded amount to the claimant, has not been brought to

the notice of the Court. Therefore, in the Constitution Bench judgment (supra)there is no reference to the other terms and conditions of contract between the insurer and the insured, such as the Avoidance Clause, apart from the clause limiting the statutory liability to Rs.50,000/-. In **AIR 1964 SC 1736 (New Asiatic Insurance Co.ltd. v. Pessumal Dhanamal Aswani) (Supra),** the question whether the insurer can recover the excess amount from the insured has been left open. However,this has been clarified in **(2001) 2 SCC 491 (Oriental Insurance Co.Ltd. v. Cheruvakkara Nafeessu and others)** (supra), which is further followed by this Court in **2003(2) GLR 1684 (Oriental Fire And General Insurance Co. v. Firdos Pervez Mysorewala and others( supra).**

19. Coming to the appeals and applying the principles of law enunciated hereinabove, we have no doubt that both the Motor Accident Claims

Tribunals had erred in making the Insurance Company liable to pay the full awarded amount without stipulation that the Insurance Company is entitled to recover the amount in excess of the statutory liability from the insurer.

20. All the three appeals are partly allowed to the extent that the appellant-Insurance Company is liable to the extent of Rs.50,000/- as per the statutory liability. However, they are directed to pay the entire amount awarded to the claimants and free to recover the amount in excess of the statutory liability paid to the claimants in appropriate execution proceedings against the insured to such extent. Costs of these appeals on parties.

(Bhawani Singh)
Chief Justice

(Smt.Abhilasha Kumari)

Judge

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